

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
1900 LINCOLN STREET
WASHINGTON, D.C. 20540
202-454-0001
202-454-0002
202-454-0003
202-454-0004
202-454-0005
202-454-0006
202-454-0007
202-454-0008
202-454-0009
202-454-0010

ARNOLD & PORTER

1200 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20036-6885
(202) 872-6700

CABLE: "ARFOPO"
FAX: (202) 872-6720
TELEX: 89-2733

PARK AVENUE TOWER
65 EAST 55TH STREET
NEW YORK, NEW YORK 10022-3219
(212) 750-5050

WILLIAM E. COOK, JR.
DIRECT LINE: (202) 872-6996

February 16, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Development of Competition and Diversity
in Video Programming Distribution and
Carriage, MM Docket No. 92-265

Dear Ms. Searcy:

Please find enclosed, on behalf of the National
Association of Telecommunications Officers and Advisors,
et al., an original and nine copies of reply comments
filed as part of the Commission's proceeding in
MM Docket No. 92-265.

Any questions regarding the submission should be
referred to the undersigned.

Sincerely,

William E. Cook, Jr.
William E. Cook, Jr.

Enclosures

No. of Copies rec'd
List A B C D E

49

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of Sections 12)
and 19 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-265

Development of Competition)
and Diversity in Video)
Programming Distribution and)
Carriage)

TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

Norman M. Sinel
Stephanie M. Phillipps
Bruce A. Henoch

Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Local Governments

February 16, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 12)
and 19 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-265

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

The National Association of Telecommunications
Officers and Advisors, the National League of Cities, the
United States Conference of Mayors, and the National
Association of Counties (collectively, the "Local
Governments") submit these reply comments in the
above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("Commission")
in this proceeding has requested comment on implementation
of Sections 12 and 19 of the Cable Television Consumer
Protection and Competition Act of 1992 ("1992 Act"). These
provisions play a vital part in furthering the 1992 Act's
goals by fostering competition in the video distribution
marketplace. As Congress determined, "[c]ompetition is

essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power."¹

The Local Governments believe that the provisions found in Sections 12 and 19, if properly implemented, will help competition develop by preventing anticompetitive practices that limit the diversity of programming and the programming available to competing delivery systems. The Local Governments are concerned with the cable industry's attempted rewriting of the statute. The industry appears to read into Sections 12 and 19 many limitations not contemplated by Congress. If adopted by the Commission, these limitations would effectively gut the statute.

Local Governments are particularly concerned about the industry's attempt to undermine the statutory limitations on exclusive contracts. Exclusive arrangements, in certain circumstances, can serve legitimate business purposes -- as Congress recognized by allowing such arrangements in limited circumstances where they serve the public interest. In a market where there is no effective competition, however, exclusive arrangements may, as Congress noted, "tend to establish a barrier to entry and inhibit the development of competition in the market." S. Rep. No. 92, 102d Cong., 1st Sess. 28 (1992).

¹ H.R. Rep. No. 628, 102d Cong., 2d Sess. 44 (1992) ("House Report").

Exclusive contracts also have the potential of limiting the diversity of choices for consumers. Exclusive contracts can make it difficult or impossible for competing multichannel programming distributors to obtain the programming necessary to gain a foothold against entrenched operators who maintain exclusive rights to popular programming. Congress restricted exclusive arrangements to remove this barrier and foster competition. Several cable operators have urged the Commission to adopt rules regarding exclusive contracts that are contrary to the express language of the statute. The Local Governments urge the Commission to apply the exclusive contract limitations broadly to ensure that the provisions have the effect intended by Congress.

II. DISCUSSION

A. Exclusive Contracts are Per Se Invalid in Areas Not Served By A Cable Operator

The National Cable Television Association ("NCTA") has suggested in its comments that exclusive contracts in areas not served by a cable operator should not be per se violations of the statute.² Instead, the NCTA claims, an exclusive contract in such an area would be invalid only if it inflicted "significant competitive injury on a

² Comments of the National Cable Television Association, Inc., filed January 25, 1993, at 40.

multichannel distributor."³ This statement contravenes the plain language of the statute. Nowhere in the statute is a showing of harm required for an exclusive contract to be found invalid in areas not served by a cable operator. To the contrary, Section 628(c)(2)(C) prohibits "practices, understandings, arrangements, and activities, including exclusive contracts . . . that prevent a multichannel video program distributor from obtaining such programming. . . ." (emphasis added). The argument that the phrase "that prevent a multichannel video programming distributor from obtaining such programming" somehow gives rise to a requirement that a showing is necessary to prove that the contract actually prevented access to programming is without merit. Exclusive contracts by definition prevent others from gaining access to programming.

Unlike Section 628(c)(2)(D), which governs areas served by cable operators, Section 628(c)(2)(C) does not give the Commission discretion to allow certain exclusive contracts on the basis of some public interest showing by the industry. Instead, exclusive contracts in unserved areas are per se invalid.⁴

³ Id.

⁴ Further, in areas not served by a cable operator, the practices prohibited by the statute are not limited to exclusive contracts. Also prohibited are any "practices, understandings, arrangements, and activities" that prevent a multichannel video distributor from gaining access to programming.

B. The Definition of Areas Served By A
Cable Operator Encompasses Only Those
Areas Where Consumers Can Actually
Obtain Cable Service at Standard Fees

Section 628(c)(2)(D) provides that exclusive contracts may be permitted in areas served by a cable operator if the Commission finds that such contracts serve the public interest. To faithfully administer this provision, the Commission must determine what constitutes an "area served by a cable operator." The cable industry asks the Commission to adopt a broad definition of an area served by a cable operator. For example, a group of multiple systems operators argue that an area served by a cable operator includes areas for which the operator has received "authorization" to build or operate, or which the cable operator is "likely" to build within a period of two years based on advanced negotiations with a franchising authority.⁵ This extremely loose definition would expand the "areas served by a cable operator" to a point well beyond the boundaries intended by Congress. The Conference Report states explicitly that, "[f]or purposes of this section, the conferees intend that an area 'served' by a cable system be defined as an area actually passed by a cable system and which can be connected for a standard connection fee." H.R. Conf. Rep. No. 862, 102d Cong., 2d

⁵ Comments of Cablevision Industries Corp., et al., filed January 25, 1993, at 16.

Sess. 93 (1992) ("Conference Report") (emphasis added). Congress clearly intended that the definition include only those areas where service is available and the public can actually obtain such service at standard rates. If consumers of an area are not able to subscribe to cable or if consumers must pay connection fees in excess of standard rates,⁶ exclusive contracts which bar program distribution in such areas are prohibited.⁷

C. If the Commission Concludes that Exclusive Contracts for Start-Up Programming are in the Public Interest, Such Contracts Should Be Limited to a Maximum of Two Years' Duration

In the NPRM, the Commission proposes that in areas served by a cable operator, exclusive contracts of up to two years' duration for newly launched programming services would be deemed to be in the public interest under Section 628(c)(2)(D). The NCTA urges the Commission to go further and allow such contracts for up to ten years.⁸

⁶ The NCTA states in its comments that the term "standard connection fee" should not be construed to exclude those installations that require the operator to assess a higher installation fee due to low density. NCTA Comments at 41, fn. 41. This assertion runs contrary to the Conference Report and would adversely affect consumers in rural and suburban areas in particular. Certainly, where the cable operator is charging a higher rate than it normally charges for a substantial number of its installations, it cannot claim that such a rate is a "standard connection fee."

⁷ This holds true even if the area not served by an operator is part of a larger franchise area that has service in most areas. Any exclusive contract that encompasses the area not served is illegal.

⁸ NCTA Comments at 47, fn. 52.

If the Commission determines that exclusive contracts for newly launched programming services are clearly and convincingly in the public interest, the Local Governments agree with the Commission that these contracts should be limited to no more than a maximum of two years' duration. A ten-year exclusive contract would not appear to be necessary for new programming ventures, and the NCTA has submitted no evidence to support its proposal for a ten-year protection period. The suggestion of ten years is outrageous and would render the statute meaningless. If any exclusivity is necessary, then a maximum of two years of exclusivity would appear to be more than enough to allow a new programming venture to gain a competitive foothold, and we would encourage the Commission to grant exclusivity for a shorter time period for most programming ventures.

D. After a Complaint is Made, the Cable Operator Should Have the Burden of Proving that the Exclusive Contract Serves the Public Interest

The Commission requested comment as to whether the exclusivity limitations would be better enforced through a complaint process or through prior approval of contracts by the Commission. The legislative history of the section supports the proposition that Congress intended to subject exclusive contracts to prior Commission approval.

[T]he FCC's regulations must prohibit exclusive contracts . . . unless the FCC determines such a contract is in the public interest.

Conference Report at 92 (emphasis added). This language suggests that exclusive contracts are prohibited unless the Commission determines on a market-by-market basis that a particular contract would meet the public interest tests set forth in the statute.

If, however, for administrative reasons, the Commission determines that the exclusivity limitations should be enforced through a complaint process, complainants could find it difficult, if not impossible, to make a prima facie showing that an exclusive contract is invalid without access to the underlying contracts and other relevant information. In the NPRM, the Commission recognizes that such evidentiary problems are an inherent drawback of the complaint process. In recognition of the fact that Congress intended the burden to be placed on cable operators to justify exclusive contracts, the Local Governments propose that if the Commission decides to use a complaint process, then to initiate the complaint process, an aggrieved party should be required to show only that it was denied access to programming. Once the complainant has made such a showing, the burden should shift to the cable operator and/or programmer to show that denial is based on an exclusive contract that meets the public interest standards articulated in the statute. The Commission should have broad authority to obtain whatever information

and clarification it deems relevant to making a determination that the challenged arrangement does (or does not) serve the public interest. This approach would make it possible for an aggrieved party to have an improper exclusive contract set aside despite the party's lack of access to relevant information.

E. Only Contracts Entered Into On or Before
June 1, 1990 May Be Grandfathered

Section 628(h)(1) spells out quite plainly that contracts entered into on or before June 1, 1990 are "grandfathered" from the limitations imposed by the statute. In the face of such clear language, several operators nevertheless state in their comments that "certain types of exclusive contracts entered into between June 1, 1990 and the effective date of the Cable Act are not anticompetitive and should, therefore, be grandfathered."⁹ Because the statute explicitly allows only contracts entered into before June 1, 1990 to be grandfathered, the Local Governments urge the Commission to reject cable industry proposals to extend the grandfather clause. The Commission should apply the statute as it is written.

III. CONCLUSION

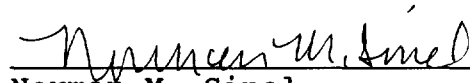
The Local Governments support strong rules to foster competition and diversity in the cable television industry.

⁹ Comments of Cablevision Industries, et al., at 17.

The provisions of Section 628 are an integral part of the structure established by Congress in the 1992 Act to promote competition and a diversity of programming to the public. The Commission should implement the provisions of Section 628 to further this Congressional intent.

The limitations on exclusive contracts are important in helping to develop a competitive marketplace and in preventing cable operators from stifling new and competing multichannel video distributors. The rules the Commission adopts should ensure that exclusive contracts are deemed per se invalid in areas not served by a cable operator, and should prohibit exclusive contracts in areas served by cable operators absent a finding that they are in the public interest. Further, the procedures the Commission adopts to enforce the limitations should allow aggrieved parties to advance their claims despite a lack of access to relevant information, and should place the burden on the cable operator and/or programmer to show that a particular exclusive contract serves the public interest.

Respectfully submitted,



Norman M. Sinel
Stephanie M. Phillipps
Bruce A. Henoch

Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Local Governments

Date: February 16, 1993